

This is a claim for a July 7, 2005, accidental injury. In the May 18, 2012, Award, ALJ Moore found claimant failed to sustain his burden of proving personal injury by accident arising out of and in the course of his employment with respondent or that claimant

sustained any functional impairment as a result of that claimed injury. The ALJ denied claimant's request for benefits.

Claimant contends he has proven this claim is compensable. Claimant requests the Board reverse the ALJ's Award and find that claimant met with personal injury by accident arising out of and in the course of employment, that claimant is credible, that claimant sustained a 15% whole body functional impairment, and that claimant is entitled to ultimately a 79.5% work disability.

Respondent contends claimant has not established that his injury that is being treated was incurred on July 7, 2005, or at any time during his employment with respondent. Respondent maintains Dr. Edward J. Prostic's functional impairment rating lacks proper foundation and that claimant is not credible. Respondent requests the Board affirm the ALJ's findings on all issues.

The issues before the Board on this appeal are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent?
2. If so, what is the nature and extent of claimant's disability?
3. What is claimant's average weekly wage?
4. Which, if any, of claimant's medical bills is respondent obligated to pay?
5. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

compensation and to prove the various conditions on which his or her right depends.¹ A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”² The phrase “arising out of” employment requires some causal connection between the injury and the employment.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible.

K.S.A. 2005 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. . . .

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

The paramount issue in this claim is whether claimant proved by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Claimant contends he injured his back in two separate accidents on July 7, 2005, when he: (1) lifted a pump in the back of a pickup truck and (2) caught the end of a telephone pole. Claimant testified he initially sought treatment at the Neosho Memorial Regional Medical Center the day after the accident. Neosho's records indicated claimant was treated on July 11, 2005, and reported suffering the back injury while moving boxes at home.

Claimant testified that a week after the accident he sought medical treatment for his back at Ashley Clinic. Ashley's records indicated claimant did not receive treatment until September 8, 2005. He again sought medical treatment for low back pain on March 1, 2007, at Ashley Clinic, where he saw Dr. John M. King. Claimant reported he had injured his back on February 28, 2007, at work. He also told Dr. King of injuring his back two years earlier at work, but that he got over it in one to two weeks. Claimant made another visit to the Neosho emergency room on May 11, 2008. The records from that visit indicated claimant's back was hurting and that he had fallen down a flight of stairs the day before. Records from another visit claimant made on June 22, 2008, to the Neosho emergency room for back pain indicated he reported falling down a flight of five stairs. The notes from that visit also indicated claimant had chronic back pain for the last four years.

¹ K.S.A. 2005 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

² K.S.A. 2005 Supp. 44-501(a).

³ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

On April 30, 2009, claimant sought treatment from another physician, Dr. Glen Singer, for low back pain and reported the injury occurred at work when claimant's boss dropped a heavy pole in his arms. Claimant continued seeing Dr. Singer for his back and other medical problems through February 7, 2011. One of those visits was on April 21, 2010, when claimant sought treatment for hip pain. Dr. Singer's notes also indicated claimant reported falling down stairs on April 11, 2010, and injuring his hips and back. Dr. Singer's notes from the February 7, 2011, visit indicated claimant wanted another chance with narcotic pain medication, but that in the past, claimant had not been honest with Dr. Singer.

Due to his own fault, claimant's medical treatment was erratic. In October 2008, Thomas Cloven, a physician's assistant at Ashley Clinic, recommended that claimant's medical treatment at Ashley be discontinued because claimant demonstrated drug-seeking behavior. Following the January 25, 2006, preliminary hearing ALJ Thomas Klein issued a September 29, 2006, Order requiring respondent to provide medical treatment for claimant. Claimant was to choose from a list of three potential treating physicians provided by respondent, but failed to do so. In 2008, Dr. Amy C. Madril at Ashley Clinic referred claimant to Dr. Michael Chang, an orthopedic surgeon in Wichita, but claimant did not follow up. Claimant testified he had no way to get to these appointments, but admitted he never asked for assistance.

Simply put, claimant is not credible. He gave several versions of how he injured his back. Since claimant's alleged accident on July 7, 2005, he has reported other incidents both at home and work, wherein he injured his back. When the ALJ ordered respondent to provide medical treatment for claimant's back, he failed to take advantage. The Board finds claimant failed to prove by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Although the Board concurs with the findings of ALJ Moore on the other issues raised by claimant, those issues are rendered moot by the foregoing findings of the Board.

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

⁴ K.S.A. 2011 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board affirms the May 18, 2012, Award entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge